

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PRESTON NELSON</b>	)	
Claimant	)	
VS.	)	
	)	
<b>AMERICAN LAMINATES, INC.</b>	)	Docket No. 187,866
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY OF NORTH AMERICA</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent and its insurance carrier appealed the December 8, 1998 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument in Kansas City, Kansas, on June 15, 1999.

**APPEARANCES**

Luis O. Mata of Kansas City, Kansas, appeared for the claimant. Michelle D. Haskins of Kansas City, Missouri, appeared for the respondent and its insurance carrier. Terri Z. Austenfeld of Overland Park, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board, the parties stipulated that the copy of the W-2 statement attached to claimant's brief to the Board should be considered part of the evidentiary record. Further, at oral argument, the parties acknowledged that they had stipulated that claimant would be entitled to receive benefits for an 18½ percent functional impairment to the left upper extremity if the claim were found compensable.

**ISSUES**

This is a claim for an alleged accident on September 11, 1993, and resulting left shoulder injury. Finding that claimant injured his left shoulder while working for the respondent on September 11, 1993, the Judge awarded him a 16 percent permanent partial disability after deducting 8 percent for preexisting impairment. Additionally, the Judge denied the respondent and its insurance carrier's request to assess liability against the Workers Compensation Fund.

The respondent and its insurance carrier contend the Judge erred. They argue that claimant is not credible and, therefore, did not prove that he injured his left shoulder working for the respondent. Alternatively, they argue that claimant knowingly misrepresented or concealed an earlier left shoulder injury when he was hired and, therefore, the Fund should be responsible for all of the award. Finally, in their brief to the Board, they point out that the Judge failed to follow the parties' stipulation, should this claim be found compensable, that claimant has an 18½ percent functional impairment to the left upper extremity after deducting an amount for preexisting functional impairment.

The Workers Compensation Fund requests the Board to affirm the Judge's finding that the Fund has no liability in this claim. The Fund argues that (1) claimant had no physical impairment in his left shoulder when he applied for a job and began working for the respondent and (2) claimant neither knowingly misrepresented nor knowingly concealed a left shoulder impairment when he went through the respondent's hiring process.

Conversely, except as to functional impairment claimant requests the Appeals Board to affirm the Judge's Award. Claimant agrees the Judge failed to follow the stipulation to the 18½ percent functional impairment.

The issues before the Board on this appeal are:

1. Did claimant injure his left shoulder working for the respondent?
2. If so, what is the nature and extent of injury and disability?
3. Does the Workers Compensation Fund have any liability in this claim?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. The Board affirms the Judge's finding that Preston Nelson injured his left shoulder on September 11, 1993, while lifting and flipping heavy boards. That accident resulted in a torn rotator cuff in the left shoulder. That finding is supported by the fact that only nine days before this accident, Mr. Nelson passed a preemployment physical in which the company physician, Dr. Richard M. Ortiz, checked Mr. Nelson's shoulders for strength and range of motion and found them normal. During that physical, there was no indication that Mr. Nelson had discomfort or pain while doing the shoulder maneuvers and testing. Further, although Mr. Nelson complained that he had injured his left shoulder in a May 1993 car wreck, Dr. Gary M.

Kramer, an orthopedic surgeon who examined Mr. Nelson in July 1993, diagnosed an impingement syndrome in the left shoulder but found no weakness in the left rotator cuff once the impingement test had been administered. The greater weight of the medical evidence indicates that Mr. Nelson did not have a torn left rotator cuff when he began working for American Laminates but tore it at work on September 11, 1993.

2. The accident was immediately reported to American Laminates who then authorized medical treatment. The accident occurred on a Saturday and Mr. Nelson saw the company doctor the following Monday. After an MRI confirmed the rotator cuff tear, Dr. Leslie Thomas did an open repair on September 22, 1993. As indicated above, the parties have agreed and stipulated that Mr. Nelson sustained an 18½ percent functional impairment to the left upper extremity should this claim be compensable. The Board adopts that stipulation.

3. The Judge denied American Laminates and its insurance carrier's request that the Award be assessed against the Workers Compensation Fund. The Board likewise finds that American Laminates did not have knowledge that Mr. Nelson had an impairment in his left arm or shoulder that constituted a handicap when it hired him. Further, the Board finds that Mr. Nelson did not knowingly misrepresent or conceal his physical condition when he went through the hiring process. Mr. Nelson did not falsify the medical questionnaire that Dr. Ortiz had him complete. And there is nothing in Dr. Ortiz's records to indicate that Mr. Nelson lied during the preemployment physical. Finally, based upon Dr. Ortiz's preemployment physical, the Board finds that Mr. Nelson did not have an impairment that constituted a handicap when he was hired by American Laminates.

4. The Board adopts the Judge's findings and conclusions to the extent they are not inconsistent with the above.

#### **CONCLUSIONS OF LAW**

1. The Award should be modified to increase the permanent partial disability benefits awarded to those for an 18½ percent functional impairment to the left upper extremity and shoulder.

2. The "scheduled injury" statute provides that a worker is entitled to receive a maximum of 225 weeks of permanent partial disability benefits for the loss of an arm and shoulder.<sup>1</sup> As provided by regulation,<sup>2</sup> after subtracting 12 weeks of temporary total disability benefits from 225 weeks, the resulting number is multiplied by the 18½ percent functional impairment rating to yield 39.41 weeks of permanent partial disability benefits that Mr. Nelson is entitled to receive as a result of the shoulder injury.

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<sup>1</sup> K.S.A. 44-510d(a)(13).

<sup>2</sup> K.A.R. 51-7-8.

3. Because American Laminates and its insurance carrier failed to prove that Mr. Nelson had an impairment that constituted a handicap or that he knowingly misrepresented or concealed that fact, the Workers Compensation Fund has no liability in this claim.<sup>3</sup>

**AWARD**

**WHEREFORE**, the Appeals Board modifies the Award dated December 8, 1998, entered by Judge Robert H. Foerschler to increase the award for permanent partial disability to the left upper extremity and shoulder from 16 percent to 18½ percent.

Preston Nelson is granted compensation from American Laminates and its insurance carrier for a September 11, 1993 accident and the resulting 18½ percent functional impairment to the left upper extremity and shoulder. Based upon a \$240 average weekly wage, Mr. Nelson is entitled to receive 12 weeks of temporary total disability benefits at \$160.01 per week, or \$1,920.12, followed by 39.41 weeks of permanent partial disability at \$160.01 per week, or \$6,306, making a total award of \$8,226.12, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Luis O. Mata, Kansas City, KS  
Michelle D. Haskins, Kansas City, MO  
Terri Z. Austenfeld, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director

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<sup>3</sup> See K.S.A. 44-567.